



The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

### **ISSUES**

- (1) What is the nature and extent of claimant's injury and disability for the injury occurring from August 1, 1990, through August 26, 1991?
- (2) Whether claimant has properly commenced proceedings before the Workers Compensation Director for an injury occurring on March 11, 1992.
- (3) Did claimant file written claim in a timely fashion for the injury of March 11, 1992?
- (4) What is the liability of the Kansas Workers Compensation Fund, if any?
- (5) What, if any, credit under K.S.A. 44-510a is appropriate?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant has proven by a preponderance of the credible evidence that he is entitled to a three percent (3%) permanent partial disability to the body as a whole as a result of an injury suffered from August 1, 1990 through August 26, 1991, while working for respondent.

Claimant began working for respondent in August 1987. He worked as a piece-work employee, helping to construct mobile homes. Claimant's job required considerable overhead work. Claimant first began developing symptoms in his left shoulder in August 1990. He was referred to Dr. James E. Marvel on July 12, 1991, who performed arthroscopic surgery on claimant's left shoulder on August 26, 1991. Subsequent to this surgery, claimant was returned to employment with temporary restrictions to the left shoulder. While working limited duty with his left shoulder, claimant developed temporary symptoms in his right arm and shoulder which, after a period of time, went away. As a result of this initial injury, claimant was assessed a three percent (3%) permanent partial impairment to the body as a whole by Dr. Marvel.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). This must be established by a preponderance of the credible evidence. [See K.S.A. 44-501(a) and K.S.A. 44-508(g)].

Claimant has proven by a preponderance of the credible evidence that during the period of August 1, 1990 through August 26, 1991, he suffered an injury arising out of and in the course of his employment to his left shoulder which resulted in a three percent (3%) permanent partial impairment to the body as a whole. The medical opinion of Dr. Marvel is uncontradicted and is not seen as improbable or unreasonable and will not be

disregarded by the Appeals Board. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

(2)(3) Claimant has failed to properly commence proceedings before the Workers Compensation Director for an injury on March 11, 1992, to his left shoulder. Claimant has further failed to provide timely written claim under K.S.A. 44-520a on said injury.

Subsequent to his return to work, claimant spent a period of time performing light duty while under Dr. Marvel's restrictions. After this period of light-duty, claimant returned to his regular employment without restriction and without accommodation by the respondent. Claimant was not experiencing symptoms or problems in his left shoulder until March 11, 1992. On that date, claimant was lifting a piece of gypsum board to an overhead rack and developed immediate pain in his left shoulder. He returned to Dr. Marvel and underwent a second arthroscopic surgery in May 1992. This second surgery was necessitated by new symptoms developed in the AC joint of claimant's shoulder, which Dr. Marvel indicated was an area not injured before. Dr. Marvel did indicate that at times it is difficult to pinpoint the exact location of an injury in the shoulder because of potential referred pain. He did inject the shoulder in order to isolate the place of the actual injury and noted the injection in the AC joint provided relief. Dr. Marvel felt claimant had two problems, one being impingement which he could see at the time of the initial surgery. The second problem stemmed from the injury to the AC joint.

The claimant's failure to file any semblance of claim for the injury of March 11, 1992, defeats claimant's right to proceed with this claim. The Special Administrative Law Judge, in awarding benefits, despite claimant's failure to file appropriate application, cites Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988) as controlling. The Supreme Court in Pyeatt stated that the procedural requirements of the Act cannot be ignored to the disadvantage of the employer. That is precisely what has occurred in this situation.

While Pyeatt may deal with issues similar to that before this Appeals Board, Pyeatt is distinguishable on several grounds. First, in Pyeatt, the injury to the claimant's back was in the same location as his prior injury. Here, the injury to claimant's AC joint was in a different location in the shoulder than that of the original injury.

The Court in Pyeatt made significant note of the fact several preliminary hearings had been held during which time claimant testified and was cross-examined about the second injury. In this case, no preliminary hearings occurred.

It should also be noted that at the time Pyeatt was decided, the Workers Compensation Act was, by statute, required to be liberally construed in order to award compensation to a worker when it was reasonably possible to do so. Nordstrom v. City of Topeka, 228 Kan. 336, § 2, 613 P.2d 1371 (1980). K.S.A. 44-501(g) has been amended since the decision in Pyeatt was rendered. Currently the language of the statute requires that the provisions of the Workers Compensation Act be applied impartially to both employers and employees in cases arising thereunder.

K.S.A. 44-520a states in part:

“(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall

be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; . . .”

In this instance, claimant failed to provide written claim to the employer regarding the incident of March 11, 1992. This failure statutorily precludes proceedings for compensation for that injury. Said failure by the claimant to file any documentation regarding the March 11, 1992 injury is fatal and the Appeals Board finds an award of compensation cannot be rendered for said injury. As it is the claimant's burden of proof to establish the claimant's right to an award of compensation by a preponderance of the credible evidence [see K.S.A. 44-501(a) and K.S.A. 44-508(g)], claimant's failure to carry this burden of proving all the conditions on which claimant's right depends mandates a denial of award in this matter.

(4)(5) Claimant has failed to prove entitlement to benefits for the March 11, 1992 injury due to claimant's failure to follow the statutorily mandated procedures under the Workers Compensation Act. As no award is due and owing for the March 11, 1992 injury, the Kansas Workers Compensation Fund would have no liability in this matter and no credit under K.S.A. 44-510a would be appropriate.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the claimant, Greg L. Stover, shall be and hereby is awarded compensation from the respondent, Skyline Corporation, and its insurance carrier, Continental National American Group, for an accidental injury occurring from August 1, 1990 and culminating on August 26, 1991, based upon an average weekly wage of \$450.76 for 10 weeks of temporary total disability compensation at the rate of \$289.00 per week in the sum of \$2,890.00, followed thereafter by 405 weeks permanent partial general bodily impairment of function at the rate of \$9.02 per week in the sum of \$3,653.10 for a 3% permanent partial general body impairment of function making a total award of \$6,543.10.

As of September 13, 1994, there would be due and owing to claimant 10 weeks of temporary total disability compensation at the rate of \$289.00 per week in the sum of \$2,890.00, followed by 149.29 weeks permanent partial general body disability at the rate of \$9.02 per week or \$1,346.60, for a total of \$4,236.60 to be paid in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 255.71 weeks permanent partial general disability at the rate of \$9.02 per week, totalling \$2,306.50 until fully paid or until further order of the Director.

The Appeals Board further finds the claimant, Greg L. Stover, shall be and is denied any award against respondent, Skyline Corporation, and its insurance carrier, Continental National American Group, for an injury on March 11, 1992.

The Appeals Board finds the Kansas Workers Compensation Fund shall bear no responsibility in this matter but shall be responsible for its own attorney's fees.

Claimant's contract of employment with his counsel is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Deposition Services Transcript of Regular Hearing	\$62.60
Kelly, York & Associates Deposition of James E. Marvel, M.D.	\$185.85
Deposition of Jerry D. Hardin	\$269.05
Deposition of Greg L. Stover	\$295.84
<b>Total</b>	<b>\$750.74</b>

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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